

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD MIELCAREK and JULIE A BYRD,

Plaintiffs-Appellees/Cross-
Appellants,

v

CHARTER TOWNSHIP OF ORION and
OAKLAND COUNTY,

Defendants,

and

OAKLAND COUNTY ROAD COMMISSION,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED
December 15, 2015

No. 323396
Oakland Circuit Court
LC No. 2012-127791-CZ

Before: SAWYER, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Defendant¹ appeals by right the trial court's order denying in part its motion for summary disposition premised on governmental immunity. Plaintiffs cross-appeal the trial court's denial of their motion for partial summary disposition. We affirm in both appeals.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Large amounts of water began infiltrating plaintiffs' basement in late November 2011. Plaintiffs contacted the township and several plumbers concerning the problem. Plaintiffs were

¹ The parties stipulated to the dismissal of defendant Oakland County from the suit. In November 2013, the trial court granted defendant Charter Township of Orion's motion for summary disposition and dismissed it from the case. Neither Oakland County nor Orion Township is a party to this appeal. Thus, the phrase "defendant" refers solely to defendant Oakland County Road Commission.

advised that the water was coming from catch basins for a storm drain along Waldon Road that was clogged and needed to be cleared. On December 9, 2011, plaintiffs notified defendant of the clogged basins. Defendant did not clear the basins and the culvert servicing Waldon Road until December 15, 2011. During that time, witnesses observed that the basins were full of debris that prevented water from getting through. It was undisputed that plaintiffs' land was lower than the land of the neighboring properties, so any overflow of water from the basins or neighboring properties would naturally flow toward plaintiffs' property.

Following defendant's repair, plaintiffs experienced minimal water infiltration in 2012; however, water began infiltrating the house again in 2013. As discussed below, plaintiff's expert concluded that the brick and mortar used in the catch basins had deteriorated, causing them not to function properly. Plaintiffs moved out of their home in mid-2013 after the home became contaminated with mold, causing plaintiffs to experience health problems. Defendant repaired the catch basins in August of 2013. Plaintiffs filed suit, alleging that the mold contamination was caused by an infiltration of water into their home, which occurred because a storm sewer system under the jurisdiction and control of defendant became clogged, resulting in storm water backing up and overflowing onto plaintiffs' property and into their home. Plaintiffs alleged that defendant could not avoid liability on the grounds of governmental immunity under either the "highway exception" or the "sewage disposal system event exception" to governmental immunity. Plaintiffs also alleged that they have suffered personal injuries in the form of rashes, cognitive deficits, pain and suffering, compromised immune systems, compromised central nervous systems, and blood disorders, as well as medical expenses and a loss of income.

Plaintiffs moved the trial court for partial summary disposition on the issue of liability under MCR 2.116(C)(9) (failure to state a valid defense to a claim). They argued that all the elements for liability under both exceptions were met and that they were therefore entitled to judgment as a matter of law on liability and a jury determination on damages alone. Relevant to this appeal, plaintiffs alleged that the two catch basins and a culvert in front of their home were intended to intercept rainwater and steer the water away from residential property. However, a sanitary sewer line first became plugged in 2010, causing minimal amounts of water to collect on plaintiffs' basement floor; the situation was corrected when the township cleared the clog. In 2011, nearby Silverbell Road was under construction, causing traffic to divert to Waldon Road, which impacted the amount of debris that filled the basins and culvert on Waldon Road near plaintiffs' property. Plaintiffs alleged that despite the increased traffic, the basins and culvert in front of their home were never placed on defendant's maintenance schedule to remove accumulated debris. On December 9, 2011, several inches of water accumulated in plaintiffs' basement and they contacted defendant that morning, advising it that the problem was due to the clogged drains in the road. Plaintiffs contacted defendant again later that day, and again on December 12, 2011. On December 13, 2011, they were told that defendant would send a Vactor truck² to clear the debris by the end of the day, but the drains were not cleared until December 15, 2011. Plaintiffs maintained that the entire culvert was not properly cleared and the basins were in disrepair. Plaintiffs alleged that experts supported their position that the water

² Vactor Manufacturing, Inc. makes vehicles designed to clean sewers and catch basins.

damage to their home, and the resulting mold infestation, were caused by defendant's lack of maintenance of the basins and culvert near plaintiffs' property after the 2011 event.

Defendant also moved the trial court for summary disposition pursuant to MCR 2.116(C)(7) (claim barred by governmental immunity), (C)(8) (failure to state a claim for which relief may be granted), and (C)(10) (no genuine issue of material fact). Relevant to this appeal, defendant argued that plaintiffs could not prove their claim under the sewage disposal system event exception because (1) the water that infiltrated their house did not originate from the basins or culvert, and plaintiffs also did not have a sump pump or drainage system around their own house; (2) the water in plaintiffs' basement could have been runoff from neighboring lots; and (3) after December 2011, defendant performed regular maintenance of the storm drain system, preventing plaintiffs from proving a defect in the system after December 2011. Defendant argued that while plaintiffs submitted expert testimony to support their theory that the basins and culvert overflowed with water, they did not have any actual evidence to support that theory. In addition, defendant argued that it responded to plaintiffs' notice of the problem within a reasonable period of time and, therefore, plaintiffs could not prove that it failed to remedy the problem within a reasonable time as required by MCL 691.1417(3). Defendant further claimed that plaintiffs failed to provide proper notice as required by MCL 691.1419, and plaintiffs could not prove that they suffered a serious impairment of body function as required by MCL 691.1418(2), due to the lack of evidence of an objective impairment caused by exposure to mold.

The trial court granted defendant summary disposition regarding plaintiff's claim that defendant was liable under the highway exception to governmental immunity; plaintiff does not challenge that ruling on appeal. Regarding the applicability of the sewage system disposal event exception, the trial court declined to grant summary disposition to either party, finding that both parties had stated a valid claim and defense to that claim; that summary disposition for defendant was not appropriate under MCR 2.116(C)(7) because, accepting plaintiff's allegations as true and construing them in a light most favorable to plaintiffs, plaintiffs had sufficiently raised an issue of fact regarding whether the sewage system disposal event exception applied; and that disputed factual issues precluded the grant of summary disposition to either party under MCR 2.116(C)(10).

These appeals followed.

II. STANDARD OF REVIEW

A trial court's summary disposition decision is reviewed de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition based on governmental immunity is properly brought under MCR 2.116(C)(7). *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Under MCR 2.116(C)(7), the reviewing court must first accept the allegations in the plaintiff's complaint as true unless contradicted by documentary evidence. If the moving party supports its motion with affidavits, deposition testimony, or admissible documentary evidence, the trial court must view that evidence and the pleadings in the light most favorable to the nonmoving party to determine whether the undisputed facts show that the moving party is entitled to immunity as a matter of law. If there is an issue of fact

regarding the right to immunity, the motion must be denied and the issue submitted to the trier of fact. *Kincaid v Cardwell*, 300 Mich App 513, 522-523; 834 NW2d 122 (2013).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Patterson*, 447 Mich at 432.

A motion under MCR 2.116(C)(9) is reviewed as follows:

When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim. *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). . . . Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 245-246; 590 NW2d 586 (1998). [*Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002).]

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

III. SEWAGE DISPOSAL SYSTEM EVENT EXCEPTION

Governmental immunity is not an affirmative defense; rather it is characteristic of government. *Mack v City of Detroit*, 467 Mich 186, 201; 649 NW2d 47 (2002). Therefore, a governmental agency is presumed to be immune from tort liability and the plaintiff has the burden of demonstrating that the case falls within one of the statutory exceptions to that immunity. *Id.* Plaintiffs' claim is based on the exception to governmental immunity for sewage disposal system events. In *Willett v Waterford Charter Twp*, 271 Mich App 38, 48; 718 NW2d 386 (2006), this Court explained:

The Legislature promulgated MCL 691.1416 through MCL 691.1419 “[t]o afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages . . . caused by a sewage disposal system event . . .” MCL 691.1417(1). Under MCL 691.1417(2), “[a] governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is

a sewage disposal system event and the governmental agency is an appropriate governmental agency.” A “sewage disposal system event” is defined, in pertinent part, as “the overflow or backup of a sewage disposal system onto real property.” MCL 691.1416(k). An “appropriate governmental agency” is defined as “a governmental agency that, at the time of the sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage” MCL 691.1416(b).

The requirements for establishing a claim under the sewage disposal system event exception are delineated in MCL 691.1417(3), which provides:

If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:

(a) The governmental agency was an appropriate governmental agency.

(b) The sewage disposal system had a defect.

(c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.

(d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.

(e) The defect was a substantial proximate cause of the event and the property damage or physical injury. [MCL 691.1417(3).]

Defendant first argues that it was entitled to summary disposition because the flooding on plaintiffs’ property was not caused by a “sewage disposal system event.” Defendant argues that because the sanitary sewer line was eliminated as the cause of the water infiltration onto plaintiffs’ property, plaintiffs cannot maintain a claim under the Sewage Act. We disagree.

MCL 691.1416(k) defines a “sewage disposal system event,” as “the overflow or backup of a sewage disposal system onto real property.” MCL 691.1416(j) defines a “sewage disposal system” as

all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, . . . , and includes a storm water drain system under the jurisdiction and control of a governmental agency.

Given the clear definitions found in MCL 691.1416(j) and (k), the mere fact that the sanitary sewer system on plaintiffs’ property was determined not to be the cause of the water backup did not preclude plaintiffs from establishing their claim as a matter of law. MCL 691.1416(j) and (k) clearly provide that a “sewage disposal system event” includes the

backup or overflow of storm sewers and storm water drain systems; notwithstanding the lack of the human waste found in the water that would colloquially be called “sewage.” See *Cannon Twp v Rockford Pub Schs*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket Nos. 320683; 320940), slip op at 7 (holding that a water filtration system was part of a sewage disposal system when the system removed waste matter from potable water); *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 115; 729 NW2d 883 (2006) (holding that a ditch drainage system, designed to divert storm water, fell within the definition of a “sewage disposal system,” even though the term “sewage” evokes waste matter only).

In this case, defendant’s system of catch basins and a culvert also was intended to divert storm water away from the road for purposes of drainage. Accordingly, they qualify as a “sewage disposal system.” Further, plaintiffs presented evidence that the water backup on their property originated from blockages in the culvert, causing storm water to back up and overflow onto their property. Therefore, plaintiffs both sufficiently alleged and factually established support for the occurrence of a “sewage disposal system event.”

Defendant also argues that it is entitled to summary disposition because there is no evidence of a “defect” that caused water to back up onto plaintiffs’ property. We disagree. Plaintiffs were required to establish that the sewage disposal system event was caused by a defect. MCL 691.1417(3)(b). “ ‘Defect’ means a construction, design, maintenance, operation, or repair defect.” MCL 691.1416(e). The term “defect,” as used in MCL 691.1416(3), means “a fault or shortcoming; imperfection.” *Cannon Twp*, ___ Mich App at ___; slip op at 7, citing *Willett*, 271 Mich App at 51, quoting *Random House Webster’s College Dictionary* (1997).

Plaintiffs’ expert witness, James Partridge, testified at his deposition that the cause of the backup was debris that blocked the flow of water through the culvert and basins, and that debris was allowed to build up in the storm water drain system due to defendant’s failure to conduct routine maintenance, including keeping the brick and concrete in good repair. This evidence supported the existence of a maintenance defect in the storm water drainage system, which if proven, could establish defendant’s liability for a sewer disposal system event.³ Further, defendant’s expert, James Surhigh, admitted that a culvert packed with dirt would restrict the flow of storm water and would not work as designed. He agreed that a basin full of sediment indicated a lack of maintenance. He also admitted that photographs of the pipes and catch basins showed that they appeared to be plugged.

Defendant also argues that there was no evidence that water continued to overflow from the basins or culvert after defendant had the storm water system flushed to remove the debris in December 2011. Defendant argues that there was no longer any defect after that date. Even if the maintenance performed in December 2011 could be deemed to have resolved any “defect”

³ Although defendant contends that this Court’s majority decision in *Fingerle v City of Ann Arbor*, 308 Mich App 318; 863 NW2d 698 (2014), supports its argument that plaintiffs failed to establish a defect, the Supreme Court recently vacated this Court’s majority opinion in that case. *Fingerle v City of Ann Arbor*, ___ Mich ___ (November 4, 2015) (Docket No. 150819).

for purposes of the Sewage Act, that would not preclude plaintiffs from establishing a claim under the act. A single incident could support a claim for damages. Moreover, according to Partridge, there were problems with the bricks in the basins that continued after the December 2011 maintenance work. Partridge explained that the joints between the bricks and the concrete had deteriorated, which required repair work that was not performed until August 2013. Because plaintiffs testified that they continued to experience water infiltration after December 2011, it was for the jury to determine whether inadequate repairs by defendant caused the continued water problems on plaintiffs' property.

In addition, evidence showed that defendant delayed in responding to the problem after plaintiffs provided notice. Plaintiffs contacted defendant about the drainage blockage after they met with township officials and had three plumbers check their home. On December 9, 2011, plaintiffs reported the drainage problem to defendant. Defendant did not actually remove the debris from the basins and culvert until December 15, 2011. In addition, the brick and concrete used to construct the basins remained in disrepair until August 2013. During the interim, plaintiffs continued to experience episodes of water infiltration. The evidence established a question of fact whether defendant took "reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect." MCL 691.1417(3)(d).

Accordingly, plaintiff both pleaded the appropriate elements of a claim under the sewage system disposal event exception, and established a factual issue regarding those elements. The trial court did not err in denying defendant's motion for summary disposition with respect to whether there was a sewage disposal system event or the existence of a defect.

IV. PROXIMATE CAUSE

Defendant also argues that plaintiffs did not establish a factual issue or genuine issue of material fact regarding whether an alleged defect in the sewage disposal system was a substantial proximate cause of the flooding on plaintiffs' property. Again, we disagree. To establish a claim for a sewage disposal system event, a plaintiff must prove that "[t]he defect was a substantial proximate cause of the event and the property damage or physical injury." MCL 691.1417(3)(e). The phrase "[s]ubstantial proximate cause" means "a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury." MCL 691.1416(l).

Defendant again relies on this Court's decision in *Fingerle v City of Ann Arbor*, 308 Mich App 318; 863 NW2d 698 (2014), in support of its argument. As stated, our Supreme Court vacated this Court's majority opinion in that case, affirming the Court's decision "for the reasons stated in the concurring opinion, *to wit*, that the plaintiff cannot make the requisite showing of 'substantial proximate cause.' MCL 691.1416(1)." *Fingerle*, ___ Mich at ___. In *Fingerle*, the plaintiff lived in a neighborhood that was prone to flooding from rainwater. The plaintiff alleged that the drainage infrastructure constructed in the 1990s was too small to handle torrential rains, causing water to back up into his basement. During a storm, water entered the plaintiff's basement, including through an egress window that the plaintiff had added. *Fingerle*, 308 Mich App at 321-322.

This Court's majority opinion construed the plaintiff's claim as one based on contract, i.e., the defendant's failure to build its drainage infrastructure the size it said it would, and held that "because the causative 'event' in issue is rain, not sewage, and because the statute provides relief for claims that sound in tort, not contract, plaintiff has no claim under the Sewage Act." *Id.* at 321-322, 324. That portion of this Court's *Fingerle* decision now stands vacated. In his concurring opinion, Judge O'Connell addressed the provisions of the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, as applicable to the facts of the case and concluded that the plaintiff "cannot make the requisite showing of substantial proximate cause" as required by MCL 691.1417(3)(e). *Fingerle*, 308 Mich App at 339 (O'CONNELL, J., concurring). Judge O'Connell explained:

The undisputed facts in this case establish that there were multiple causes of the rainwater in plaintiff's basement on June 5-6, 2010. Those causes included the unusually intense rainstorm, the allegedly defective relief storm sewer, and the installation of plaintiff's basement egress window. The record confirms that both before and after the 1990 construction of the relief storm sewer, rainwater periodically flooded into basements in plaintiff's neighborhood. Plaintiff has provided no evidence to establish that the relief storm sewer exacerbated the flooding, or, for that matter, that the relief storm sewer failed to divert water. Instead, plaintiff contends that although the city had no duty to build any relief storm sewer, the city should nonetheless have built a bigger, better system than the one actually built. However, plaintiff provides no evidence to establish that bigger would be better in this case. Plaintiff's evidence establishes, at best, that on the night of the intense rainstorm, the relief storm sewer did not divert enough rainwater to prevent water from entering plaintiff's basement egress window. This evidence does not establish that the alleged defects were a substantial proximate cause of the overflow and of the rainwater in plaintiff's basement.

The trial court and the dissent conclude that there is a factual issue regarding whether the alleged defects were a substantial proximate cause of the overflow and the influx of rainwater. This conclusion is incorrect, for two reasons. First, the factual issues in the record, if any, are not material to substantial proximate cause. Plaintiff contends, and the trial court and the dissent accept, that the affidavit and report of plaintiff's expert create a factual issue on the substantial proximate cause of the overflow and the damage. This contention is misplaced, because plaintiff's expert does not address the multiple causes of the overflow and of the basement rainwater. Nothing in plaintiff's expert's report assesses the effect of the relief storm sewer on the degree of basement flooding that had historically occurred or that would have occurred without the relief storm sewer. Nor does plaintiff's expert assess the effect of plaintiff's decision to add a basement egress window in an area prone to flooding. Instead, plaintiff's expert addressed solely the alleged defects in the relief storm sewer. Given the multiple causes of plaintiff's basement rainwater, the expert's report does not establish that the alleged defects were 50% or more of the cause of the overflow, or of the basement rainwater.

Second, the trial court and the dissent assume that reasonable minds would overlook the multiple causes of plaintiff's basement rainwater. I disagree with this assumption. This Court must address the causation issue as a matter of law, unless reasonable minds could differ on the legal effect of the facts. See *Willett*, 271 Mich App at 45, 53-54. The facts in this case establish that plaintiff's basement flooded because an egress window failed to withstand historic flooding from an unusually heavy rainfall. Although reasonable minds might differ regarding whether the relief storm sewer was defective, no reasonable mind could conclude that the relief storm sewer was a substantial proximate cause of the basement rainwater. [*Fingerle*, 308 Mich App at 340-342 (O'CONNELL, J., concurring).]

This case is distinguishable from *Fingerle* in part because the property in that case had been subject to flooding for many years after heavy rainfalls. The evidence in this case indicates that while plaintiffs had experienced previous water backups in their basement, those were substantially different from the type of flooding that occurred during November and December 2011 and subsequently in 2013. Furthermore, plaintiffs' expert, Partridge, eliminated other possible causes for the flooding, such as the sanitary sewer. Partridge also opined that the water was not the result of neighboring properties draining rainwater onto plaintiffs' land, because the amount of water that inundated plaintiffs' property could not be attributed to the natural flow of rainwater and runoff from other properties. Additionally, multiple witnesses observed that the culvert and catch basins were blocked and, once those were cleared, the flooding dissipated. These facts support that defendant's failure to maintain the sewage disposal system was a substantial proximate cause of the flooding in plaintiffs' basement.

We also disagree with defendant's argument that plaintiffs cannot establish that the alleged defect in the sewage disposal system was a substantial proximate cause of the flooding because plaintiffs did not have a sump pump on their property. Partridge was specifically asked if the lack of a sump pump contributed to or caused the water backup on plaintiffs' property. He explained that whether a sump pump is necessary depends on the type of soil. He stated that a sump pump is not needed if the soil is sandy, clay loam, or a mixture of the two, or gravel, and that the soil on plaintiffs' property was sandy. He was not surprised that there was not a sump pump on the property. Partridge felt that it was not necessary to perform further analysis regarding a sump pump because the number of gallons of water that inundated plaintiffs' property after a one-inch rainfall, amounting to 6,000 gallons, could only be explained by the storm water drainage system along the road overflowing. Defendant's expert, Surhigh, disagreed that a sump pump was not necessary, but he could not explain the significant amount of water that infiltrated the property.

Because the parties' experts disagreed whether the lack of a sump pump was a contributing factor to the flooding in plaintiffs' basement, and because Partridge testified that there was no other reasonable explanation for why so much water infiltrated plaintiffs' property other than that the basins had overflowed, the trial court did not err in finding that there was a genuine issue of material fact regarding whether the alleged defect in the sewage disposal system was a substantial proximate cause of the flooding on plaintiffs' property.

Finally, we find no merit to defendant's suggestion that plaintiffs' theory of causation was not supported by evidence, and instead based on speculation, because the flooding was just as likely to have been caused by natural rainwater draining from other properties. As noted, several witnesses who were present when the basins were checked confirmed that they were full of debris to the point that water could not flow through them. Partridge also testified that groundwater measurements and the volume of water that flooded onto plaintiffs' property were inconsistent with drainage from neighboring properties. The evidence established a genuine issue of material fact regarding the source of the water infiltration.

V. PLAINTIFFS' ENTITLEMENT TO NONECONOMIC DAMAGES

Defendant also argues that plaintiffs cannot prove entitlement to noneconomic damages and, presumably, at a minimum it should have at least been granted partial summary disposition on that issue. MCL 691.1418(1) provides that only economic damages are available unless the plaintiff can meet the requirements of MCL 691.1418(2), which provides that a plaintiff can recover noneconomic damages "if the claimant . . . has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 691.1418(3) provides:

In an action for noneconomic damages under section 17, the issues of whether a claimant or the individual on whose behalf the claimant is making the claim has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(a) There is no factual dispute concerning the nature and extent of the claimant's or the individual's injuries.

(b) There is a factual dispute concerning the nature and extent of the claimant's or the individual's injuries, but the dispute is not material to determining whether the claimant or the individual has suffered a serious impairment of body function or permanent serious disfigurement.

MCL 691.1416(h) defines a "serious impairment of body function" as that phrase is defined in MCL 500.3135 of the no-fault act. MCL 500.3135(5) provides that "'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

Here, Connie Morbach, an expert regarding the effects of mold on health, performed testing on plaintiffs' home and found various types of mold, which she believed were associated with the flooding incident in 2011. She advised plaintiffs to leave the home because it was not habitable and there was a potential for imminent danger. Plaintiff's developed various ailments, for which they saw an allergist, and which they allege are results of their mold exposure.

Defendant argues that there is no evidence that plaintiffs have "an objectively manifested impairment of an important body function." Defendant asserts that plaintiffs have only subjective claims of illnesses that they attribute to the mold in their home, and that testing performed by plaintiffs' allergist are not objective manifestations of impairment sufficient for

plaintiffs to recover noneconomic damages. Defendant incorrectly relies on *Netter v Bowman*, 272 Mich App 289; 725 NW2d 353 (2006), which in turn was based on *Kreiner v Fisher*, 471 Mich 109; 683 NW2d 611 (2004), to argue that plaintiffs must produce verifiable information from a qualified medical person to prove that an impairment was objectively manifested. Both *Netter* and *Kreiner* were overruled by *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), with respect to the requirement that a serious impairment of body function requires objective verification from a medical professional or through some sort of medical testing. Under *McCormick*, medical documentation is not always required to prove a serious impairment of body function. Nonetheless, given the letters from plaintiffs' doctor, Dr. Gerald Watzke, plaintiffs have established sufficient factual support for an objective link between the mold that developed in their home and their illnesses. Dr. Watzke's letter indicates that plaintiff Richard Millcreek was tested for mold exposure and neurotoxicity, and that Watzke opined that his symptoms, including unsteadiness while walking, frequent falling, impaired vision, slurred speech, severe pain, tremors, memory loss, and confusion, were caused by mold toxicity and sensitivity. With regard to plaintiff Julie Byrd, she also tested positive for mold exposure; Natchez's letter indicates that testing was ongoing to determine if her symptoms, including inflamed and tender joints, weight loss, hair loss, arthritis, diarrhea, and laryngitis were related to mold exposure. Further, other medical records and deposition testimony indicate that Richard was hospitalized in 2014 for encephalopathy and hemorrhaging of the gastrointestinal tract, among other things, and that Julie developed an adrenal gland mass, a cyst on her liver, a mass in her stomach, and fluid near her spleen, among other symptoms. We conclude that, viewed in the light most favorable to plaintiffs, plaintiffs produced sufficient evidence to establish a genuine issue of material fact regarding "an objectively manifested impairment of an important body function."

Accordingly, for the reasons stated above, the trial court did not err in denying defendant's motion for summary disposition.

VI. PLAINTIFFS' CROSS-APPEAL

In their cross-appeal, plaintiffs argue that the trial court erred in denying their motion for summary disposition regarding defendant's liability under the Sewage Act. We disagree. As discussed earlier, the evidence established questions of fact regarding the source of the water infiltration into plaintiffs' basement, and whether defendant reasonably responded to the situation after it received notice on December 9, 2011 and cleaned out the culvert and basins on December 15, 2011. Also, although plaintiffs established a factual issue regarding the presence of objective manifestations of impairments due to exposure to mold that could qualify as serious impairments of a body function, there are still significant questions of fact regarding a causal link between those alleged impairments and mold exposure, and questions of fact regarding whether any impairments have affected plaintiffs' abilities to lead normal lives. Accordingly, the trial court did not err in denying plaintiffs' motion for summary disposition.

Affirmed.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Mark T. Boonstra